

DOCUMENT NUMBER: 09-EUC-0013
PROJECT NUMBER: C5-014-00210
PROPERTY CATEGORY: 2



VIRGINIA G. LINK
REGISTER OF DEEDS - CLAY COUNTY KANSAS
Book: CR118 Page: 79
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Virginia G. Link

ENVIRONMENTAL USE CONTROL AGREEMENT

XEROX

Boettcher Enterprises, Inc., a Kansas corporation, having a mailing address of P.O. Box 486, 118 West Court Street, Beloit, Kansas 67420, hereinafter referred to as "the Owner", is the owner of real property known as the Valley Fertilizer, Clay Center Site, in Clay Center, Clay County, Kansas, as shown on the map attached hereto as Exhibit A, hereinafter referred to as "the Property", and more particularly described by the following legal description:

A tract of land lying in the Northwest Quarter of the Northeast Quarter (NW1/4 NE1/4) of Section Seven (7), Township Eight (8) South, Range Three (3) East of the 6th P.M., Clay County, Kansas and in the Southwest Quarter of the Southeast Quarter (SW1/4 SE1/4) of Section Six (6), Township Eight (8) South, Range Three (3) East of the 6th P.M., Clay County, Kansas, and in Block Twenty-five (25) of the Original Townsite of the City of Clay Center, Clay County, Kansas, and also in Block One (1) of Mrs. C. M. Anthony's First Addition to the City of Clay Center, Clay County, Kansas, described as follows:

Beginning at the Southeast corner of Lot Eight (8), Block Twenty-five (25) of the Original Townsite of the City of Clay Center, Clay County, Kansas; THEN North along the east line of Lot Eight (8) to the Northeast corner of Lot One (1) of said Block Twenty-five (25); THEN West along the North line of Block Twenty-five (25), extended, to intersect with the West line of the alley running north and south along the West side of Block Ten (10) of the Original Townsite of Clay Center and Block One (1) of Lots Three, Four and Five (3, 4 & 5) of Sterlings Sub-Division of Lots Eighteen (18) and Nineteen (19) of Holzgang's Division; THEN North on said West line to the South Right of Way of U.S. Highway 24; THEN in a southwesterly direction along the South Right of Way of U.S. Highway 24 to the point of intersection with centerline of the abandoned Union Pacific Railroad Company; THEN in a southeasterly direction along the centerline of said abandoned railroad to the point of intersection with the South line of said Block Twenty-five (25); THEN East along the south line of said Block Twenty-five (25) to the point of beginning.

And which shall likewise include any and all parcels contained therein.

WHEREAS the Owner has requested, by application to the Kansas Department of Health and Environment, hereinafter referred to as "KDHE", to restrict, prohibit and/or limit certain uses of the Property in accordance with Kansas Statutes Annotated (K.S.A.) 2007 Supp. 65-1,221 *et seq.*

KDHE has approved the Owner's application to restrict, prohibit, and/or limit certain uses of the

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Property since residual contamination, which exceeds department standards for unrestricted residential use, remains on the Property.

The conditions at the Property as of the date of KDHE's approval of the application are as follows:

The Property, once used for agricultural chemical distribution operations between 1963 and 1994, is now abandoned. Based on Geoprobe sampling conducted at the Property in 1998, alachlor, atrazine, nitrate and ammonia remain in groundwater and soil at concentrations exceeding their corresponding primary maximum contaminant levels (MCLs) as promulgated by the federal Safe Drinking Water Act and their soil and/or soil-to-groundwater pathway screening values as established in the *Risk-Based Standards for Kansas RSK Manual – 4th Version* (June 2007). Current analytical results of groundwater samples collected from monitoring wells at and downgradient from the Property indicate that only nitrate concentrations exceed the MCL.

Excavation of impacted soil at the Property was determined to be impractical due to the distribution of contaminants in the subsurface. Therefore, the Final Corrective Action Decision document for the site presents that extraction well, RW-1, continue to recover contaminated groundwater downgradient of the source area while allowing contaminants in the source area to passively flush through the saturated zone. The recovered groundwater is discharged to the Republican River under a National Pollution Discharge Elimination System permit that will expire on December 31, 2014. At this time, treatment of the groundwater by carbon filtration is not required due to the little to no detections of pesticides. Semi-annual groundwater monitoring of the contamination plume, currently overseen by the KDHE-Bureau of Environmental Remediation under the auspices of the State Cooperative Program, is conducted under a Consent Order Agreement (Case No. 95-E-0031) mutually agreed to by Boettcher Enterprises, Inc. and KDHE in 1995.

KDHE has determined, based on conditions at the Property, the application and other information pertaining to the Property, that environmental use controls are appropriate to ensure future protection of public health and the environment, subject to the conditions herein. Therefore, in accordance with K.S.A. 2007 Supp. 65-1,226 and the rules and regulations promulgated thereunder, the Property is hereby designated by KDHE as a Category 2 property.

The Owner acknowledges that this Agreement runs with the land and is binding on all successors in interest in the Property pursuant to K.S.A. 2007 Supp. 65-1,227(b); and is enforceable by KDHE pursuant to K.S.A. 2007 Supp. 65-1,229, unless and/or until such requirements are mutually terminated in writing by KDHE and Owner or Owner's successor in interest. For purposes of the obligations set forth in this document, "Owner" shall be deemed to include the current Owner and any and all successors in interest.

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This Agreement shall be recorded, by the Owner, with the Clay County Register of Deeds for the purposes of providing notice of the environmental use controls, protecting public health and the environment, and to prevent interference with the operation, performance, and/or maintenance of any remedial actions on the Property.

RESTRICTIONS, PROHIBITIONS AND LIMITATIONS:

Due to the environmental conditions described above, it is the desire and intention of the Owner to restrict, prohibit, and/or limit the following uses of the Property:

- A. The Property shall not be used for residential purposes of any type including, but not limited to, a residence or dwelling, including a house, apartment, mobile home, nursing home, or condominium; or public use area, including a school, educational center, day care center, playground or similar structure, unrestricted outdoor recreational area, or park.
- B. The Owner shall not allow water wells to be drilled, constructed, or used on the Property for the purposes of domestic, lawn and gardening, or other means, which use involves or may involve human consumption and/or other possible human contact uses. This restriction does not prohibit drilling, construction or use of water wells for the purpose of containing product or contamination, or for contaminated ground water recovery, monitoring, or other remediation activities as approved in writing by KDHE.
- C. KDHE shall be provided with notification fifteen (15) calendar days prior to any excavation activities. KDHE may require sampling of soils prior to, during or after any excavation activities. Based on the potential hazards associated with the soil disturbance activities, KDHE may require specific protective or remedial actions when allowing such soil disturbance activities to occur on the Property.
- D. The Owner shall inform all easement holders, contractors and/or other workers performing any excavation activities on the Property, prior to such activities, of the potential hazards associated with the direct contact and/or transport of any potentially contaminated and/or hazardous soil or other material from the Property. Easement holders, contractors and/or workers shall also be informed by the Owner of any potential hazards associated with releases from contaminated media located on the Property.
- E. The Owner shall not file or petition to initiate re-zoning of the Property without fifteen (15) calendar days prior notification to KDHE.
- F. The Owner shall preserve, protect and replace, as necessary, all permanent survey markers and benchmarks and all environmental monitoring stations that may be installed on the Property.
- G. The Owner shall obtain prior written authorization from KDHE before undertaking any of

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the following:

1. Performing work on any monitoring devices or systems on the Property except for routine maintenance and emergency maintenance, in which case KDHE shall be notified of such maintenance as soon as is practicable;
2. Undertaking any excavation or construction of drainage ditches on the Property; or
3. Altering the vegetation grown on the Property in a manner inconsistent with routine management practices.

LOCAL ORDINANCES AND ZONING:

The Owner and KDHE acknowledge that the following local ordinances and zoning requirements in place at the time of recording this Agreement shall be used in addition to the restrictions, prohibitions and limitations set forth in this Agreement.

The Property is zoned commercial and residential by the City of Clay Center, Kansas.

ACCESS:

The Owner hereby agrees and conveys to KDHE, its agents, contractors, and employees, access to the Property for the term of this Agreement to enter or come upon the Property to inspect the Property and perform any required action (i.e., monitoring, sampling, etc.) KDHE deems necessary for any one or more of the following purposes:

1. Ensuring that use, occupancy, and activities of and at the Property are consistent with this Agreement;
2. Inspecting protective structures and any other remedial systems to ensure their designed operation, performance and structural integrity;
3. Documenting environmental conditions of and at the Property;
4. Ensuring implementation and enforcement of the requirements, restrictions, prohibitions, and other limitations described in this Agreement; and/or
5. Performing any additional investigations or remediation deemed necessary by KDHE to protect public health and the environment.

FUNDING:

The Owner hereby agrees to submit to KDHE a one-time payment of \$8,000 to compensate KDHE

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for costs incurred to perform inspections, monitoring, and tracking of the terms and requirements of this Agreement. The Owner acknowledges that the funding requirement for this Agreement is based on the size of the Property, physical properties of residual contamination, types of protective structures at the Property, frequency of KDHE's anticipated inspections and anticipated inspection costs.

DURATION:

The Owner hereby agrees that this Agreement extends in perpetuity unless and/or until removal following approval by KDHE pursuant to K.S.A. 2007 Supp. 65-1,227.

INSPECTION REQUIREMENTS:

KDHE shall visually inspect the Property once every five (5) years and prepare a written report documenting the inspection findings and current uses of the Property to verify the Property is being used as indicated herein. KDHE may consider modifications of the frequency of inspection and reporting if warranted by technical data.

OTHER TERMS AND CONDITIONS:

The Owner hereby agrees to provide KDHE written notification no less than fifteen (15) calendar days prior to any sale, lease, conveyance or other transfer of the Property. The notice shall include the name and business address (if applicable) of the transferee and the expected date of transfer.

The Owner shall cause any lease, grant, or other transfer of any interest in the Property to include a provision expressly requiring the lessee or transferee to comply with the terms of this Agreement. The failure to include such a provision shall not affect the validity or applicability to the Property of this Agreement.

Within fifteen (15) calendar days of real property conveyance, the Owner hereby agrees to provide KDHE a copy of the recorded deed with legal description and corresponding survey map for which this Agreement applies.

The Owner hereby agrees to provide KDHE written notification no less than fifteen (15) calendar days prior to any land use changes at the Property.

The Owner acknowledges that the requirements in this Agreement may not be extinguished, limited or impaired through adverse possession, abandonment, waiver, lack of enforcement, or other common law principles, pursuant to K.S.A. 2007 Supp. 65-1,227(e).

This Agreement may be modified by mutual written agreement by the Owner and KDHE. Within thirty (30) calendar days of executing an amendment, modification, or termination of this Agreement, the Owner shall record such amendment, modification, or termination with the Clay

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County Register of Deeds, and within thirty (30) calendar days thereafter, the Owner shall provide a copy of the recorded amendment, modification, or termination to KDHE that bears the seal and/or notarized signature of the Register of Deeds.

ENFORCEABILITY:

If the terms of this Agreement are not being implemented by the Owner or contamination at the Property presents a hazard to public health or the environment, KDHE may take such action as authorized by K.S.A. 2007 Supp. 65-1,229, including:

- A. Issue an order directing the Owner to correct any deficiencies and fully implement the terms of this Agreement.
- B. Issue an order retracting this Agreement and any remedial action at the Property and requiring the Owner to implement a remedial action at the Property to attain a cleanup standard that will allow for unrestricted use of the Property.

EFFECTIVE DATE OF AGREEMENT:

The Owner shall provide to KDHE a copy of this Agreement bearing the seal or notarization of the Register of Deeds in **Clay County** within ninety (90) days from **certified receipt** of this fully executed Agreement from KDHE.

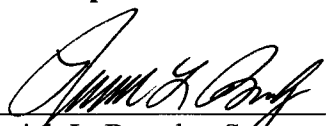
The Owner shall provide KDHE with funding as determined by KDHE in accordance with K.S.A. 2007 Supp. 65-1,226 within ninety (90) days from **certified receipt** of this fully executed Agreement from KDHE.

Proper recording of all necessary documents and submission of required funding shall be conditions precedent to the effectiveness of this Agreement.

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IN WITNESS WHEREOF, KDHE and the Owner have entered into and executed this Environmental Use Control Agreement through their duly authorized representatives as of this 15th day of April, 2010.

Kansas Department of Health and Environment

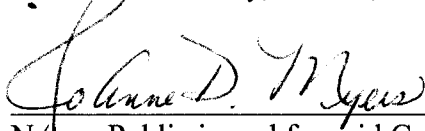
By: 
Roderick L. Bremby, Secretary

ACKNOWLEDGMENT:

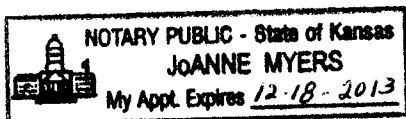
STATE OF KANSAS)
)ss:
COUNTY OF SHAWNEE)

BE IT REMEMBERED, on this 15th day of April, 2010, before me, the undersigned, a Notary Public in and for the County and State aforesaid, came Roderick L. Bremby, Secretary and authorized representative of KDHE, who is personally known to be such person who executed the above document on behalf of KDHE, and such person duly acknowledged the execution of the same to be his/her act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at my office in Shawnee County, Kansas, the day and year last written above.


Notary Public in and for said County and State

My Term Expires: 12-18-2013



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Corporation: **Boettcher Enterprises, Inc.**

By: Jarold W. Boettcher

Date: June 23, 2010

Print Name: Jarold W. Boettcher

Title: President

ACKNOWLEDGMENT:

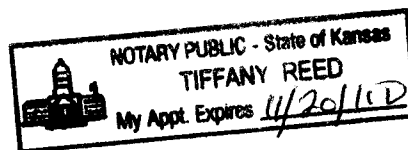
STATE OF Kansas)
)ss:

COUNTY OF Shawnee)

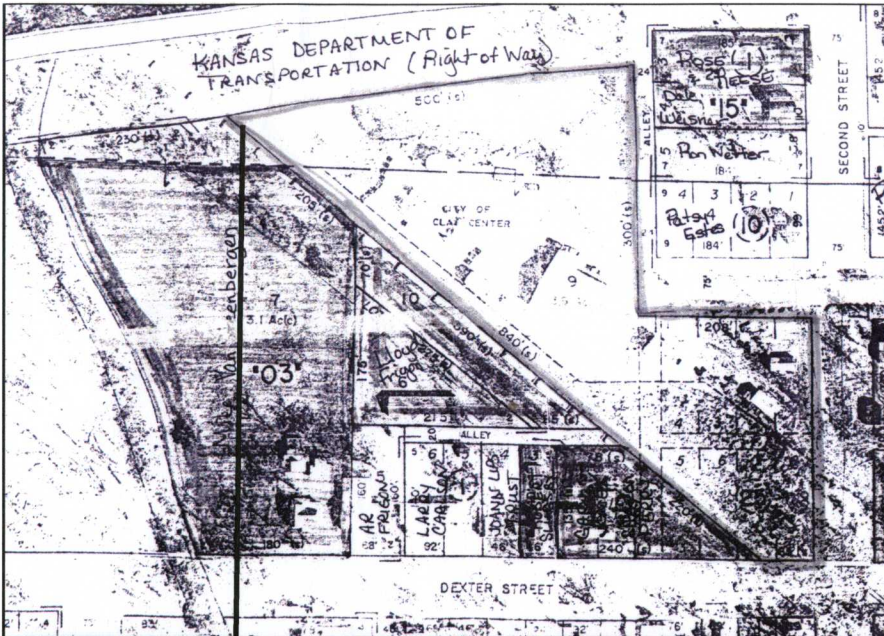
BE IT REMEMBERED, on this 23rd day of JUNE, 2010, before me, the undersigned, a Notary Public in and for the County and State aforesaid, came Jarold W. Boettcher authorized representative of Boettcher Enterprises, Inc., who is personally known to be such person who executed the above document on behalf of said corporation, and such person duly acknowledged the execution of the same to be his/her act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at my office in Shawnee County, 6/23/10, the day and year last written above.

Tiffany Reed
Notary Public in and for said County and State



My Term Expires: 11/20/10



A tract of land lying in the Northwest Quarter of the Northeast Quarter (NW1/4 NE1/4) of Section Seven (7), Township Eight (8) South, Range Three (3) East of the 6th P.M., Clay County, Kansas and in the Southwest Quarter of the Southeast Quarter (SW1/4 SE1/4) of Section Six (6), Township Eight (8) South, Range Three (3) East of the 6th P.M., Clay County, Kansas, and in Block Twenty-five (25) of the Original Townsite of the City of Clay Center, Clay County, Kansas, and also in Block One (1) of Mrs. C. M. Anthony's First Addition to the City of Clay Center, Clay County, Kansas, described as follows:

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0 125 250 500 Feet



Map Prepared by KDHE

LEGEND

- Local Roads
- EUCA Area Boundary (approximate)

Exhibit A

Valley Fertilizer
Clay Center, Kansas
09-EUC-0013

In Sec. 6 & 7, T8S, R3E